In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1041

MT. SINAI HOSPITAL OF GREATER MIAMI, INC., PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

In its reply to our brief in opposition, petitioner incorrectly asserts (pp. 1-4) that our discussion of 42 U.S.C. 1395f(a)(7)[1] (Br. in Opp. 10, n. 11) amounts to a confession

[1]The statute was amended in 1972, in a manner that does not bear upon the discussion here. It now provides in pertinent part:

> * * * [P]ayment for services furnished an individual may be made * * * only if * * *
>
> (7) with respect to inpatient hospital services or post-hospital extended care services furnished such individual during a continuous period, a finding has not been made * * * pursuant to the system of utilization review that further inpatient hospital services or further post-hospital extended care services, as the case may be, are not medically necessary; except that, if such a finding has been made, payment may be made for such services furnished before the 4th day after the day on which the hospital or skilled nursing facility, as the case may be, received notice of such finding.

of error. Since the statutory provisions relating to this case are complex, and petitioner's assertion might otherwise confuse the Court, we submit this rejoinder to clarify the matter.

It has been our position throughout this litigation that payments made by the Secretary in advance of any determination of non-necessity are subject to recoupment if it is subsequently determined that the services for which the payments were made were not medically necessary. Such payments are made erroneously, and recoupment is appropriate for the reasons stated in our brief in opposition.

Under 42 U.S.C. 1395f(a)(7), however, the Secretary has discretionary authority to pay for certain medically unnecessary inpatient hospital services, and post-hospital extended care services, for a period of three days after notice of the determination of non-necessity. Since such payments, if made, are not erroneous but instead represent a deliberate exercise of discretion, there is, as we indicated in the footnote on which petitioner relies, an open question whether their recoupment would later be permitted.

That question, however, is wholly irrelevant to this case. There is no indication in the record that any of the payments sought to be recouped here represented a deliberate exercise by the Secretary of his discretion to pay for services already determined to have been unnecessary. Accordingly, notwithstanding petitioner's late-blooming and unsupported assertion to the contrary (Pet. Reply Br. 3), the payments at issue here are not "protected under Sec. 1395f(a)(7)."

For the reasons stated above and in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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